IN THE
COURT OF APPEALS FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

RICARDO ROMANO, Appellant	§ §	
V.	§ §	CAUSE NO. 01-18-00538-CR
STATE OF TEXAS, Appellee	§ §	

APPELLANT'S REPLY TO THE
STATE'S MOTION FOR REHEARING *EN BANC*

TO THE HONORABLE FIRST COURT OF APPEALS:

Ricardo Romano, appellant, files this reply to the State's motion for rehearing *en banc*, and would show as follows:

I.

This is an appeal from a misdemeanor conviction for indecent exposure. A panel consisting of Justices Kelly, Hightower, and Countiss reversed the judgment of conviction and rendered a judgment of acquittal in an unpublished opinion issued on October 8, 2019. Romano v. State, No. 01-18-00538-CR (Tex. App—Houston [1st Dist.] 2019, no pet. filed). The State filed a motion for rehearing *en banc* on October 23, 2019. The Court requested that appellant respond by November 19, 2019.

II.

The Court should deny the State's motion for rehearing *en banc* for three

reasons. First, the State mischaracterizes the panel's application of Jackson v. Virginia, 443 U.S. 307 (1979), and its Texas progeny. Second, the State mischaracterizes the record. Third, the panel's unpublished, non-precedential opinion is not worthy of *en banc* review.

1. The Panel Cited and Correctly Applied Jackson and Its Texas Progeny.

The State erroneously contends that the panel "misapplied the standard for reviewing the sufficiency of the evidence" required by Jackson. State's Motion at 3-4. To the contrary, the panel cited numerous Texas decisions that applied the standard of review governing sufficiency-of-the-evidence claims first announced in Jackson. Slip op. at 10-11, 13-17 (citing cases). The panel applied the appropriate amount of deference to the verdict but, as required by Jackson and its Texas progeny, carefully reviewed the record to determine that the evidence was insufficient even when viewing the evidence in a light most favorable to the verdict.

2. The State Mischaracterizes the Record.

In claiming that the evidence was sufficient that appellant exposed himself in a reckless manner in the vicinity of other people, the State contends that, at the time that appellant did so, Officer Gardiner was "nearby" appellant. State's Motion at 5 ("The appellant disregarded the rustling of leaves ***nearby***, which was caused by Gardiner's horse, so he was aware at the very least that someone might

view him from that direction, even if he escaped detection by passing traffic, cyclists, or pedestrians in the picnic area of a Houston public park.") (emphasis added).

As discussed in appellant's reply brief on original submission, the video recorded by the officer's body camera clearly shows that he was ***not*** "nearby" appellant. Rather, as the panel correctly noted, "Gardiner was hiding a good distance away in the trees and bushes." Slip op. at 16. Review of the video clearly demonstrates that he was hundreds of feet away.[1] The panel also corrected stated that: "During Gardiner's fifty-five seconds of surveillance of Romano, no pedestrians or park patrons are visible on the video. Gardiner testified that no one other than Romano was in the parking lot and that the nearest parking lot where someone might be parked was an estimated quarter-mile away. He also testified that, from his hidden vantage point, he could not see any people in the area at the time that Romano was exposing himself, and he admitted that no one was on the street to have seen Romano. Gardiner, who was admittedly hiding from Romano,

[1] The Court of Criminal Appeals has held that, when "videotape [evidence] presents indisputable visual evidence contradicting essential portions of [a police officer's] testimony," an appellate court must not defer to the trial court's explicit or implicit findings based on the officer's inconsistent testimony. Carmouche v. State, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000). Although Carmouche concerned a trial court's factual findings in the context of a pretrial motion to suppress evidence, its logic fully applies to an appellate court's review of whether sufficient evidence supports a defendant's conviction. See Love v. State, 73 N.E.3d 693, 695 (Ind. 2017) ("We hold that Indiana appellate courts reviewing the sufficiency of evidence must apply the same deferential standard of review to video evidence as to other evidence, unless the video evidence indisputably contradicts the trial court's findings.") (citing Carmouche).

believed that he was the only person who saw Romano expose himself." Slip op. at 15-16.

Accordingly, no rational factfinder could conclude that appellant was reckless in exposing himself to other people.

3. The Panel's Unpublished, Non-Precedential Opinion About a Fact-Specific Issue Is Not Worthy of *En Banc* Review.

"*En banc* consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require *en banc* consideration." TEX. R. APP. 42.1. This case does not warrant *en banc* review under that stringent standard. As discussed above, the panel correctly cited applicable precedent and correctly reviewed the record.

Significantly, the panel's opinion is not designated for publication. Unpublished opinions have no precedential value in criminal cases in Texas. TEX. R. APP. P. 47.7(a) ("Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value . . . ."). Therefore, even assuming *arguendo* that the State is correct that the panel's decision conflicts with other Texas cases, this unpublished, fact-specific opinion will not cause future discord because it has no precedential value. For the same reason that federal circuit courts rarely grant *en banc* review of unpublished,

non-precedential panel opinions,[2] this Court too should not waste its valuable resources reviewing an unpublished panel opinion.

CONCLUSION

The Court should deny the State's motion for rehearing *en banc*.

Respectfully submitted,

/S/ Josh Schaffer
Josh Schaffer
State Bar No. 24037439

1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com (email)

Attorney for Appellant
RICARDO ROMANO

CERTIFICATE OF SERVICE

I served a copy of this document on Cory Stott, assistant district attorney for Harris County, by electronic service on November 10, 2019.

/S/ Josh Schaffer
Josh Schaffer

[2] See, e.g., Alex Kozinski and Stephen Reinhardt, Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions, CAL. LAW., June 2000, at 44 ("[W]e seldom . . . take [unpublished opinions] *en banc*.").